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Loco Parents: A Case for the Overhaul of Social-Host Liability in Florida

SAMUEL RANDALL*

I. INTRODUCTION

In late May 2005 Jeff Bolduc hosted a party to celebrate the graduation of his seventeen-year-old daughter from Palm Bay High School in Florida.¹ Anticipating that his daughter's guests would celebrate their achievement by drinking alcohol, Bolduc recruited eight adults to help chaperone the party and to confiscate car keys from the partygoers. Bolduc permitted his daughter and her friends to buy two kegs of beer and invite fifty guests to the party.² As often happens with high school keg parties, the fifty guests quickly turned into 150 guests. As a result, Bolduc was arrested by the Palm Bay Police Department's "Operation Party Patrol," a local task force charged with cracking down on underage alcohol consumption.³ The state charged Bolduc with a misdemeanor⁴ under Florida's new "Open House Party" law, which provides:

No person having control of any residence shall allow an open house party to take place at said residence if any alcoholic beverage or drug is possessed or consumed at said residence by any minor where the person knows that an alcoholic beverage or drug is in the possession of or being consumed by a minor at said residence and where the person fails to take reasonable steps to prevent the possession or consumption of the alcoholic beverage or drug.⁵

In response to the arrest, Andy Hindman, the director of the Florida chapter of Mothers Against Drunk Driving, commented that by condoning and allowing underage drinking, Bolduc's actions were counter-productive, regardless of his altruistic intentions:⁶ "One of the greatest problems we have is parental attitudes. . . . The most prevalent is the idea that young people will do it anyway, but that doesn't work, because it's against the law. . . . As parents, there aren't any laws we should

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1. Linda Jump, *Party Patrol Nabs Dad for Letting Teens Drink*, FLA. TODAY, May 28, 2005, at A1.

2. *Id.*

3. *Id.*

4. *Id.*

5. FLA. STAT. § 856.015(2) (2007).

6. See Jump, *supra* note 1.

encourage our kids to break.”⁷ Bolduc, however, disagreed with Hindman’s assessment: “We knew if we just said, ‘[y]ou can’t drink,’ they would go out anyway and possibly kill themselves. . . . I couldn’t rely on the cops to keep my kids safe . . . [.] If one of their friends or they got hurt, I couldn’t live with myself.”⁸ Despite Bolduc’s good intentions, the state attorney’s office proceeded with charges against him. Ultimately, Bolduc was convicted of a misdemeanor, although the judge withheld entry of adjudication against him.⁹

Less than two years later, in January 2007, Bolduc and his family celebrated his stepdaughter Kassadi’s seventeenth birthday. This time, Bolduc did not allow drinking to take place at the party, and instead stayed up until 11:00 p.m., playing ping pong with Kassadi and a few of her friends.¹⁰ Bolduc then went to bed, leaving the teens unsupervised.¹¹ At approximately 3:00 a.m., Kassadi, along with two nineteen-year-old friends, Shane Alvarez and Ryan Popovich, went out for a joyride on a pair of motorbikes.¹² The two bikes collided and all three youths were killed. Ryan had a blood alcohol content (“BAC”) of 0.11 grams per deciliter, an amount in excess of the state’s legal limit to operate a motor vehicle.¹³ Shane and Kassadi had BAC levels just below this legal limit.¹⁴ Neither Bolduc nor his wife, Diane Pullins, knew that the teens were drinking.¹⁵ Despite an investigation by the state attorney’s office, no charges were filed against Bolduc,¹⁶ presumably because he didn’t know about the teens’ behavior and it would not be possible to prove that he violated the open-house-party law.

These two incidents illustrate the flaw inherent in Florida’s social-host policy. During the evening celebration of his daughter’s high school graduation, Bolduc allowed underage drinking to take place in his home.¹⁷ Bolduc took steps to ensure that no one drove drunk, all revelers who came to the party that evening had a place to sleep in either Bolduc’s home or in neighbors’ homes, and all had their car keys confis-

7. *Id.* (internal quotation marks omitted).

8. *Id.*

9. J.D. Gallop, *Third Teen in Crash Was Drunk, Tests Show*, FLA. TODAY, Feb. 20, 2007, at A1. The court withheld entry of adjudication against Bolduc. *See id.* If he had taken his case to trial and been found guilty, Bolduc could have received up to sixty days in jail for a second-degree misdemeanor conviction. *See* FLA. STAT. § 775.082(4)(b) (2007).

10. Gallop, *supra* note 9.

11. *Id.*

12. *Id.*

13. *Id.* Under Florida law, a driver is deemed intoxicated at a BAC of .08 grams per deciliter.

14. *Id.*

15. *Id.*

16. Kimberly C. Moore, *Year Later, No Charges in Deaths*, FLA. TODAY, Jan. 5, 2008, at B1.

17. Jump, *supra* note 1.

cated.¹⁸ No one was hurt that night, despite the fact that at least one hundred uninvited guests attended the party.¹⁹ Nevertheless, Bolduc was prosecuted and convicted for his actions during the first incident and faced potential jail time.²⁰

On the evening of the second incident, Bolduc did not allow any drinking in his presence, but later went to bed, leaving the teenagers unsupervised. Shane, Ryan, and Kassadi all consumed alcohol after Bolduc retired and subsequently engaged in reckless behavior that led to their deaths.²¹ Under Florida law, Bolduc is almost certainly safe from both civil and criminal liability for his actions on the night of the second incident. This is not to say that Bolduc should be culpable for his actions on this tragic evening. It seems, though, that Florida law encourages parents to turn a blind eye to underage drinking by immunizing those who can establish "plausible deniability," while punishing those who attempt to affirmatively supervise this common, if not largely inevitable, behavior.

Both courts and state legislatures have played an active role in the debate over parents' responsibility for preventing their children from drinking in the home. While the criminal prosecution of parents such as Jeff Bolduc is rare, U.S. courts have been far more willing to police parents who furnish alcohol to minors through the imposition of civil liability for injuries that stem from their guests' intoxication. This form of liability, widely known as social-host liability,²² allows for a civil cause of action against an individual who serves alcohol in violation of statutory or common-law standards of care.²³

This note examines and analyzes the law governing social-host liability in Florida and recommends a policy that would more appropriately

18. *See id.*

19. *See id.*

20. Violation of FLA. STAT. § 856.015 (2007) is a second-degree misdemeanor, punishable by up to sixty days in jail. FLA. STAT. § 775.082(4)(b) (2007); *see also* Gallop, *supra* note 9.

21. Gallop, *supra* note 9.

22. *See, e.g.*, Matthew C. Houchens, *Killer Party: Proposing Civil Liability for Social Hosts Who Serve Alcohol to Minors*, 30 J. MARSHALL L. REV. 245, 261 (1996) (advocating the reversal of an Illinois policy immunizing social hosts who serve minors); Michael K. Steenson, *With the Legislature's Permission and the Supreme Court's Consent, Common Law Social Host Liability Returns to Minnesota*, 21 WM. MITCHELL L. REV. 45, 51-65 (1995) (praising the Minnesota Supreme Court's ruling recognizing a cause of action against a social host who served underage guests); Hilary Ray Weinert, *Social Hosts and Drunken Drivers: A Duty To Intervene?*, 133 U. PA. L. REV. 867, 891 (1985) (arguing for the imposition of a duty on social hosts to prevent their guests from driving drunk).

23. *See, e.g.*, *Estate of Hernandez v. Arizona Bd. of Regents*, 866 P.2d 1330, 1333-34 (Ariz. 1994) (finding a duty owed under Arizona common law to refrain from serving alcohol to minors); *Newsome v. Haffner*, 710 So. 2d 184, 185 (Fla. 1st Dist. Ct. App. 1998) (imposing a duty based on the Florida legislature's passage of a criminal statute regulating open house parties).

address and contain the dangers of underage drinking. Part II of this note briefly summarizes the history of minimum-drinking-age laws in the United States and discusses the costs and effects of underage drinking. Part III examines Florida's current system of liability governing social hosts by tracing its origin from vendor liability. Part IV surveys the various approaches employed by states across the country in formulating social-host policy. Finally, Part V addresses the inherent problems and limitations of the system in place in Florida and recommends changes and modifications.

II. THE EPIDEMIC OF UNDERAGE DRINKING

Teenage drinking in the United States has been a controversial issue since at least the Vietnam era. After prevailing in the fight against a democratic system that required those under age twenty-one to fight in a war that, prior to 1971,²⁴ they could not vote against, many young activists set their sights on the minimum-drinking-age laws.²⁵

A. *The History and Effect of Minimum-Drinking-Age Laws*

Within a decade of the passage of the Twenty-first Amendment, most states changed their minimum-drinking-age laws. In fact, by 1979 there were only fourteen states in which someone under the age of twenty-one could not buy a beer.²⁶ States quickly began to regret, however, the newfound freedom they had given to young citizens. For instance, in 1972 Michigan lowered its legal drinking age from twenty-

24. The Twenty-sixth Amendment to the U.S. Constitution was officially ratified on July 1, 1971, just 100 days after it was proposed by the Senate. See Ratification of Constitutional Amendments: The U.S. Constitution Online, <http://www.usconstitution.net/constamrat.html#Am26> (last visited May 10, 2008). This was the shortest ratification process for any of the Amendments to the U.S. Constitution. See Lynn D. Wardle, *Federal Constitutional Protection for Marriage: Why and How*, 20 BYU J. PUB. L. 439, 469 n.142 (2006).

25. Houchens, *supra* note 22, at 253–54.

26. Nancy E. Jones, Carl F. Pieper & Leon S. Robertson, *The Effect of Legal Drinking Age on Fatal Injuries of Adolescents and Young Adults*, 82 AM. J. PUB. HEALTH 112, 113 (1992). In 1979 only Arkansas, California, Indiana, Kentucky, Michigan, Missouri, Mississippi, Nevada, New Mexico, North Dakota, Oregon, Pennsylvania, Utah, and Washington prohibited those under the age of twenty-one from buying all alcoholic products. As of January of 1979, the minimum drinking age was eighteen in the District of Columbia along with eighteen states (Connecticut, Florida, Georgia, Hawaii, Louisiana, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, South Carolina, Texas, Vermont, Virginia, West Virginia, and Wisconsin). In Colorado, Kansas, Ohio, Oklahoma, and South Dakota, eighteen-year-olds could buy beer with 3.2% alcohol content, but they had to wait until they turned twenty-one before they could buy any other alcoholic beverages. Eleven states allowed nineteen-year-olds to buy alcohol (Alabama, Alaska, Arizona, Idaho, Illinois, Iowa, Minnesota, Montana, Nebraska, Tennessee, and Wyoming), and in Maine and Delaware the drinking age was twenty. *Id.*

one to eighteen.²⁷ In the three years following the change, the state witnessed an additional 4600 alcohol related accidents, including eighty-nine that involved at least one fatality.²⁸ Moreover, in the first year after the drinking age was returned to twenty-one, the state saw a 31% decrease in alcohol related accidents among eighteen-year-olds to twenty-year-olds.²⁹

Confronted with substantial evidence of the disastrous effects of lowered legal drinking ages, President Ronald Reagan joined congressional democrats in 1984 to pass legislation that made the receipt of a portion of federal highway funds contingent on state legislatures raising the minimum legal drinking age to twenty-one.³⁰ At the White House signing ceremony, President Reagan commented:

We know that drinking, plus driving, spell death and disaster. . . . We know that people in the 18-to-20 age group are more likely to be in alcohol-related accidents than those in any other age group. . . . It's a grave national problem, and it touches all our lives. . . . With the problem so clear-cut and the proven solution at hand, we have no misgiving about this judicious use of Federal power.³¹

At the time the law was enacted, there was speculation that Florida and other states would not allow the penalty to affect local minimum-drinking-age laws.³² Within four years, however, all fifty states and the

27. See Ernest Holsendolph, *Safety Board Asks All States To Fix 21 as Drinking Age*, N.Y. TIMES, July 24, 1982, § 1, at 16; see also Houchens, *supra* note 22, at 254.

28. Houchens, *supra* note 22, at 254. Other studies support the conclusion that lower legal drinking ages greatly increase the number of traffic accidents and fatalities involving young drivers. Holsendolph, *supra* note 27 (detailing the National Transportation Safety Board finding that there is an "irrefutable" link between those who die in a motor vehicle crash and alcohol consumption by young people, as well as the National Highway Traffic Safety Administration's report finding a 28% decrease in nighttime traffic fatalities involving eighteen- to twenty-one-year-olds in states that had recently raised the legal drinking age).

29. *Id.*

30. Steven R. Weisman, *Reagan Calls for Drinking Age of 21*, N.Y. TIMES, June 21, 1984, at B2.

31. Steven R. Weisman, *Reagan Signs Law Linking Federal Aid to Drinking Age*, N.Y. TIMES, July 18, 1984, at A15 (internal quotation marks omitted). President Reagan had previously objected to the move to induce states to lower the legal drinking age on federalism grounds, considering the drinking age to be a state issue:

Some may feel that my decision is at odds with my philosophical viewpoint that state problems should involve state solutions, and it isn't up to a big and overwhelming Government in Washington to tell the states what to do And you're partly right.

. . . .

In a case like this, where the problem is so clear cut and the benefits are so clear cut, then I have no misgivings about a judicious use of Federal inducements to encourage the states to get moving, raise the drinking age, and save precious lives[.]

Weisman, *supra* note 30 (internal quotation marks omitted).

32. See Weisman, *supra* note 31. South Dakota, which allowed those under age twenty-one to buy beer, brought a civil action in federal court seeking declaratory relief that the law violated

District of Columbia had succumbed and no individual under the age of twenty-one could purchase alcohol in any jurisdiction in the country.³³

The enactment by Congress of a federal minimum-drinking-age law resulted in many saved lives. In the six months after the state of New York raised its minimum-drinking age, the number of fatal car accidents involving people under twenty-one years of age declined by 41%.³⁴ Nationally, the higher drinking age was credited with decreasing drunk-driving accidents by persons under age twenty-one by 10–20%.³⁵ Further, in the twenty years following the increase in the drinking age, researchers estimated that over 20,000 lives were saved by the measure.³⁶

B. *The Costs of Underage Drinking*

Despite the benefits provided by the increased minimum-drinking-age laws over the last two decades, underage drinking still has devastating effects based on any accurate assessment, whether quantitative³⁷ or qualitative,³⁸ and the costs attributed to this problem are borne by all members of society.³⁹ Nonetheless, the custom of drinking is highly

Congress's Article I spending power, as well as the Twenty-first Amendment. The Supreme Court ruled, however, that the conditional grant of highway funds was valid because it was unambiguous and pursued the general welfare of the nation. *South Dakota v. Dole*, 483 U.S. 203, 208 (1987). The Court also upheld the act of Congress on Twenty-first Amendment grounds. *Id.* at 205–206; *see also* U.S. CONST. art. I, § 8, cl. 1; U.S. CONST. amend. XXI.

33. Lisa Belkin, *Wyoming Finally Raises Its Drinking Age*, N.Y. TIMES, July 1, 1988, at A8. A spokesman for Wyoming's governor said that the Supreme Court's rejection of the South Dakota challenge to Congress's conditional grant of highway funds played a role in the decision to raise the drinking age. If Wyoming left its drinking age at nineteen, it would have lost out on \$8–10 million per year in federal aid. An additional factor cited by the spokesman was that a number of teenagers from other states would come to Wyoming to drink and would then drive home and get into accidents, giving the state the nickname "Bloody Wyoming." *Id.*

34. Elizabeth Kolbert, *Alcohol Accidents Dip 44% Among New York Youths*, N.Y. TIMES, Dec. 18, 1986, at B1.

35. *Id.*

36. Jim Gogek, *Putting Caps on Teenage Drinking*, N.Y. TIMES, Aug. 25, 2004, at A23. The National Highway Traffic Safety Administration ("NHTSA") estimated that by 2003, 22,798 lives were saved as a result of increased minimum-drinking-age laws enacted after 1975. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., YOUNG DRIVERS: TRAFFIC SAFETY FACTS 1 (2003).

37. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND REDUCE UNDERAGE DRINKING 10 (2007), available at <http://www.surgeongeneral.gov/topics/underagedrinking/calltoaction.pdf> [hereinafter CALL TO ACTION]. According to this report, underage drinking is responsible for approximately 5000 deaths per year; it is a leading contributor to death of individuals under twenty-one; and it is responsible for 1900 traffic fatalities, 1600 homicides, and 300 suicides each year. *Id.*

38. Heavy alcohol use by adolescents interferes with physiological, physical, and emotional maturation, and it impedes the development of the human brain. *See id.* at 1–2, 25–26.

39. 45% of those who die in a motor vehicle crash attributable to an underage drunken driver are people other than the driver. *Id.* at 11.

prominent in teenage popular culture.⁴⁰ This proposition has empirical support: Nearly 80% of teenagers have tried alcohol before they graduate from high school, and about 90% of twenty-one-year-olds have tried alcohol before their twenty-first birthday.⁴¹

Although the minimum-drinking-age laws have greatly reduced traffic fatalities suffered by young drivers, motor-vehicle accidents remain the leading cause of death for sixteen- to twenty-year-olds by a wide margin,⁴² with the youthful decedent having a BAC above the legal driving limit in 25% of these accidents.⁴³ These figures are most com-

40. Movies like the *American Pie* trilogy and reality-television programming on MTV such as *Laguna Beach* and *The Real World* are both widely popular and culturally reflective, depicting binge drinking among high school students as a way of life. See *AMERICAN PIE* (Universal Studios 1999); *AMERICAN PIE 2* (Universal Studios 2002); *AMERICAN WEDDING* (Universal Studios 2003). See generally *Laguna Beach* (MTV television broadcasts 2004–2006); *The Real World* (MTV television broadcasts 1992–2007). All three *American Pie* films grossed over \$100 million in domestic box office receipts, while the MTV reality shows are among the top five most-watched shows for every demographic grouping for those aged 12–24. See Abigail Azote, *Boost for the Real O.C., 'Laguna Beach,'* MEDIALIFE MAG., Aug. 12, 2005, available at http://www.medialifemagazine.com/News2005/aug05/aug8/5_fri/news4friday.html; IMDb, The Internet Movie Database: All-Time USA Box Office, <http://www.imdb.com/boxoffice/alltimegross> (last visited April 1, 2008).

41. CALL TO ACTION, *supra* note 37, at 3. One study found that the typical college student under the legal drinking age consumed an average of 20.8 drinks per month in 2001. David J. Hanson, College Student Drinking Rates, <http://www2.potsdam.edu/hansondj/YouthIssues/1101836683.html> (last visited April 29, 2008). Another study found that the average American child's first experience with alcohol comes at the age of fourteen, and half of Colorado high school seniors engaged in binge drinking. Colleen O'Connor, *Wasted Alcohol's Young Abusers: Drunker, Earlier: 1 in 10 Fourth-Graders Have Had a Sip. Over Half of High School Seniors Binge-Drink*, DENV. POST, Apr. 23, 2006, at A1.

42. Motor-vehicle accidents were responsible for 39% of all deaths in this age group in 2002 and 37% of all deaths in 2003, the last two years for which complete mortality statistics are available from the NHTSA. By comparison, homicide, the second leading cause of death for the age group, was responsible for 15% of all fatalities in each year. Rajesh Subramanian, *Motor Vehicle Traffic Crashes as a Leading Cause of Death in the United States, 2003*, in TRAFFIC SAFETY FACTS RESEARCH NOTE (2006), available at <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/ncsa/motes/2006/810568.pdf>; Rajesh Subramanian, *Motor Vehicle Traffic Crashes as a Leading Cause of Death in the United States, 2002*, in TRAFFIC SAFETY FACTS RESEARCH NOTE (2005), available at <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/ncsa/motes/2005/809831.pdf>.

43. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS 2003 DATA: YOUNG DRIVERS (2003), available at <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSF2003/809774.pdf>. The percentage of these youthful drivers intoxicated at the time of the accident increases with the age of the driver, ranging from 13% of all sixteen-year-olds to 32% of all twenty-year-olds. *Id.*; see also NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS ALCOHOL: ALCOHOL-RELATED CRASHES AND FATALITIES (2005), available at http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSF2005/2005TSF/810_616/images/810616.pdf [hereinafter ALCOHOL-RELATED CRASHES AND FATALITIES]. According to the study, alcohol played a role in 21% of the motor-vehicle deaths for children aged fourteen and younger. Presumably, these children were neither driving nor drunk during the accident that took their lives and were instead innocent victims killed by other drunk drivers of all ages.

monly cited in both praising⁴⁴ and critiquing⁴⁵ the national minimum-legal-drinking age of twenty-one and in advocating the appropriate role that parents should play with regard to underage drinking.⁴⁶

In a 2007 report, *A Call to Action*, the surgeon general performed a comprehensive analysis on the costs of underage drinking and outlined a strategy intended to combat this national concern.⁴⁷ The surgeon general warned that “[u]nderage drinking is deeply embedded in the American culture, is often viewed as a rite of passage, is frequently facilitated by adults, and has proved stubbornly resistant to change. A new, more comprehensive and developmentally sensitive approach is warranted.”⁴⁸ The report outlined a strategy formulated to change societal and cultural norms regarding underage drinking.⁴⁹ As its “ultimate goal,” the surgeon general intends to eliminate all consumption of alcohol by those under twenty-one.⁵⁰

44. Patricia Hincken, *We Can't Just Target Kids; Any Solution to Underage Drinking Requires That Adults Change Their Ways, Too*, *NEWSDAY*, Apr. 16, 2006, at A44. Hincken is the chair of the Long Beach Coalition to Prevent Underage Drinking. *Id.*

45. See Dwight B. Heath, *Children and Young People: Teach Safe Drinking to Your College-Bound Teen*, <http://www2.potsdam.edu/hansondj/youthissues/1044362486.html> (last visited April 29, 2008). Dwight Heath is a professor of anthropology at Brown University and is considered to be “the world’s leading anthropological authority on drinking.” *Id.*

46. See Hincken, *supra* note 44; Heath, *supra* note 45. Hincken advocates that parents become more proactive and combative in preventing underage drinking, while Heath urges parents to instill in their children the ability to drink in moderation before they get to college, where drinking is largely inevitable. Both authors cite the same statistics and figures to arrive at diametrically opposed and conflicting conclusions; however, these two editorials effectively demonstrate the positions at both ends of the spectrum in the debate over how to properly ease the epidemic that is underage drinking.

47. See generally *CALL TO ACTION*, *supra* note 37.

48. *Id.* at 2.

49. *Id.* at 27.

50. *Id.* at 27 n.12. The methods through which *A Call to Action* intends to achieve its stated goal are as follows:

- Invest in alcohol-free youth-friendly programs and environments.
- Widely publicize all policies and laws that prohibit underage alcohol use.
- Work with sponsors of community or ethnic holiday events to ensure that such events do not promote a culture in which underage drinking is acceptable.
- Urge the alcohol industry to voluntarily reduce outdoor alcohol advertising.
- Promote the idea that underage alcohol use is a local problem that local citizens can solve through concerted and dedicated action.
- Establish organizations and coalitions committed to establishing a local culture that disapproves of underage alcohol use, that works diligently to prevent and reduce it, and that is dedicated to informing the public about the extent and consequences of underage drinking.
- Work to ensure that members of the community are aware of the latest research on adolescent alcohol use and, in particular, the adverse consequences of alcohol use on underage drinkers and other members of the community who suffer from its secondhand effects. An informed public is an essential part of an overall plan to prevent and reduce underage drinking and to change the culture that supports it.

Although the report was published with altruistic intentions, this expectation is highly unrealistic. The report even concedes as much, admitting that “underage drinking is so strongly embedded in the Nation’s culture that the more realistic goals of increasing the average age of initiation and reducing underage drinking and its negative consequences are included as incremental steps.”⁵¹ Even if the techniques outlined by the surgeon general were successfully implemented, it is difficult for an objective and realistic mind to imagine these methods having more than a minimal effect on the underage consumption of alcohol.⁵² A more realistic and obtainable approach would be to reduce the rates of underage binge drinking.⁵³ A *Call to Action* notes that teenage drinkers imbibe less often than those of legal drinking age, but when they do drink, they consume far more alcohol per sitting.⁵⁴

It is this behavior of binge drinking that provokes the most concern. For instance, drivers with traceable amounts of alcohol in their system below the legal limit, were responsible for just 5% of all fatal traffic accidents in 2005, while those with BACs above the legal limit were responsible for more than one-third of all motor-vehicle fatalities.⁵⁵ Moreover, many of the physiologically detrimental effects of underage alcohol consumption are only triggered through binge drinking or long periods of sustained, heavy drinking.⁵⁶ Thus, given that decreasing the rampancy of underage binge drinking would largely alleviate many of the detrimental effects of teenage alcohol consumption, a strategic policy that addressed this aim could prove both equally beneficial and more effective than the one prescribed by the surgeon general.

Few would quibble with the claim that parents of adolescents are in an ideal position to help implement this policy objective. For this reason, any policy intended to effectively combat underage drinking should place as one of its primary objectives the parental supervision of youth-

Id. at 42–43.

51. *Id.* at 27 n.12.

52. The strategies listed in *A Call to Action* include efforts to warn of the adverse consequences of alcohol and to publicize the laws prohibiting underage drinking, yet the report notes that one of the primary catalysts for underage drinking stems from the adolescent desire to rebel and take risks. Given this fact, some of the strategies listed above could prove counterproductive. *Id.* at 16–17.

53. Binge drinking is defined as five or more drinks on one occasion for a male, and four or more drinks for a female. *Id.* at 6–7.

54. *Id.* The study also notes that because younger drinkers are less sensitive to certain side effects of alcohol such as sedation and loss of muscle coordination, they are far more likely to attempt to drive when they are too impaired to do so safely, and they are also more likely to drink themselves into a coma. *Id.* at 24–25.

55. See ALCOHOL-RELATED CRASHES AND FATALITIES, *supra* note 41.

56. See CALL TO ACTION, *supra* note 37, at 25–26.

ful bacchanal.⁵⁷ By putting responsible parents in a position to counter and respond to teenage bingeing, many of the victims of underage drinking could be saved. One weapon in the arsenal that can help further this objective is the imposition of civil liability through social-host policy.⁵⁸ At the heart of this debate is the appropriate scope of the duty that parents owe as social hosts to underage drinkers. Unfortunately, the approach to social-host policy employed by most states—Florida included⁵⁹—either does not go far enough to punish parents who fail to supervise drinking in their home,⁶⁰ or has the effect of deterring such supervision.⁶¹

III. SOCIAL-HOST LAW IN FLORIDA

Social-host liability in Florida is a relatively new development. Prior to 1998 Florida courts did not recognize a civil cause of action against a noncommercial host who served alcohol in a social setting.⁶² The existing social-host policy in the state traces its derivation from the gradual evolution of the legislature's regulation of alcoholic-beverage law with respect to commercial-vendor, or dramshop liability.

A. Vendor Liability

At 8:30 p.m. on the evening of January 27, 1960, sixteen-year-old Darrell Davis and two minor friends went to the Estuary Bar in Tampa Bay.⁶³ The tavern offered a drive-through service in which patrons could order alcohol from their vehicles.⁶⁴ According to a complaint later filed against the tavern, an employee sold the three teenagers a twenty-four-pack of beer and half a pint of whiskey without ascertaining

57. Leading scholars on the consumption of alcohol such as the renowned Ivy League anthropologist, Dwight Heath, advocate this moderation approach. See Heath, *supra* note 45.

58. See Hincken, *supra* note 44. Hincken also argues for an expansion of the duty owed by parents as social hosts, so that parents who allow children to drink can be found liable even if they are not the ones who furnish the alcohol:

[W]e need to shift from penalties for "providing" alcohol, which is the cornerstone of the current ordinance, to fines for "allowing" alcohol to be consumed by minors—a much broader category. Holding adults accountable is not a popular stance—there is concern about privacy rights and alcohol being sneaked into a home without parents' knowledge—but it is a necessary one.

Id.

59. See discussion *infra* Part III.

60. See discussion *infra* Part IV.

61. See discussion *infra* Part V.

62. Bankston v. Brennan, 507 So. 2d 1385, 1385 (Fla. 1987) (finding that Florida law did not recognize a cause of action against a private social host); Newsome v. Haffner, 710 So. 2d 184, 185 (Fla. 1st Dist. Ct. App. 1998) (recognizing a cause of action against a social host under the Florida open-house-party law).

63. See Davis v. Shiappacossee, 145 So. 2d 758, 758 (Fla. 2d Dist. Ct. App. 1962).

64. *Id.*

their ages.⁶⁵ The three boys drove off and before the end of the night had consumed all of the whiskey and fourteen cans of beer.⁶⁶ At roughly 1:50 a.m., Davis was killed when he lost control of the automobile and crashed into a tree.⁶⁷

In the ensuing lawsuit, Reginald Davis alleged that the tavern keeper violated a provision of the state's penal code proscribing the sale of alcoholic beverages to minors and that this infraction constituted negligence per se.⁶⁸ The trial court dismissed this complaint for failure to state a cause of action, and the Second District Court of Appeal agreed, finding that the decedent's accident was a remote and improbable consequence of the defendant-respondent's sale of alcohol and only a "Dram Shop Act" could abrogate a vendor's common-law immunity from such a transaction.⁶⁹ The Florida Supreme Court rejected both of these arguments, and found that the state's statute criminalizing the sale of alcohol to minors⁷⁰ gave rise to a cause of action in negligence per se.⁷¹

Over the next quarter-century, Florida courts looked to *Davis* for guidance in adjudicating disputes arising from injuries linked to the sale of alcohol to minors. Four years after *Davis*, the Second District Court of Appeal affirmed a jury verdict and substantial judgment in favor of Harry McClennan, who was shot in the back after a bar-fight broke out between two minors who were served alcohol at the establishment.⁷² McClennan was not involved in the fight and was injured only after one of the combative minors used him as a shield from his pistol-wielding

65. *Id.* at 758–59.

66. *Id.* at 759.

67. *Id.*

68. *See Davis v. Shiappacosse*, 155 So. 2d 365, 366 (Fla. 1963).

69. *See id.* at 366, 367; *Davis*, 145 So. 2d. at 759–60. State dramshop acts provide a plaintiff injured by an inebriate with a cause of action against the vendor that was the source of the tortfeasor's intoxication. *See generally* Wienert, *supra* note 22, at 874–77.

70. FLA. STAT. § 562.11 (1961) (last amended 1957) reads:

It is unlawful for any person, firm or in the case of a corporation, the officers, agents and employees thereof, to sell, give, serve or permit to be served alcoholic beverages, including wines and beer, to persons under twenty-one years of age or to permit a person under twenty-one years of age to consume said beverages on the licensed premises. Anyone convicted of violation of the provisions hereof shall be punished by imprisonment in the county jail for not more than six months or by fine of not more than five hundred dollars.

Id.

71. *See Davis*, 155 So. 2d. at 366–368. In Florida, a civil defendant who is found to have violated a criminal statute is rendered negligent per se, thus giving rise to a rebuttable presumption of negligence. This presumption is overcome by a finding that the violation of the statute was not the proximate cause of the plaintiff's injury. *See, e.g.*, FLA. STANDARD JURY INSTRUCTIONS: CIVIL § 4.9 (1974).

72. *See Prevatt v. McClennan*, 201 So. 2d 780, 781 (Fla. 2d Dist. Ct. App. 1967), *superseded by statute*, FLA. STAT. § 768.125 (1994), *as recognized in* *Kitchen v. K-Mart Corp.*, 697 So. 2d 1200, 1203 (Fla. 1997).

adversary.⁷³ Whereas *Davis* recognized a cause of action in which the injured party was the intoxicated minor served in violation of state law, *Prevatt* was notable in that it extended civil liability to third parties injured by the intoxicated minor.⁷⁴ The Second District reasoned:

[T]he statute that makes it a crime to sell intoxicants to minors was doubtless passed to prevent the harm that can come or be caused by one of immaturity by imbibing such liquors. The very atmosphere surrounding the sale should make it foreseeable to any person that trouble for someone was in the making.⁷⁵

While *Davis* and *Prevatt* recognized and expanded the scope of liability for those who provided minors with alcohol, two subsequent Florida cases rejected this novel form of liability. In *Bryant v. Jax Liquors*, Florida's First District Court of Appeal affirmed the trial court's dismissal of a suit brought on behalf of a plaintiff who had become paralyzed from the neck down while attending an initiation party for a high school club for which the defendant liquor store provided a case of rum.⁷⁶ The court found as a matter of law that the plaintiff's paralysis, which resulted when he either fell or was pushed by another inductee into the club, was too remote and improbable a consequence of the sale of alcohol to the victim's friends to constitute proximate cause.⁷⁷

More influential to the evolution of Florida's social-host policy was

73. *See id.*

74. Many states make a distinction between first-party liability to the intoxicated minor and third-party liability to an innocent bystander. *See, e.g., Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 306 (Idaho 1999) (finding that there is no cause of action on behalf of the underage inebriate while recognizing the existence of the same on behalf of a third-party plaintiff); *Reynolds v. Hicks*, 951 P.2d 761, 767 (Wash. 1998) (finding that the legislature did not afford a cause of action on behalf of a third-party motorist injured by an intoxicated minor against the provider of alcohol because the statute was only intended to protect minors from the harms of alcohol). By recognizing a cause of action on behalf of both first- and third-party plaintiffs, Florida courts chose not to draw a distinction between innocent victims and the inebriates themselves. The Florida legislature intervened in 1999, forcing courts to distinguish between intoxicated plaintiffs and innocent third parties by stringently limiting any cause of action brought by the former. *See* FLA. STAT. § 768.36(2)(b) (2007) (denying the award of damages to a plaintiff whose intoxication caused the plaintiff to be more than 50% responsible for his or her injury).

75. *Prevatt*, 201 So. 2d at 781.

76. 352 So. 2d 542, 543–44 (Fla. 1st Dist. Ct. App. 1977).

77. *See id.* at 544. It is difficult to reconcile this case with *Prevatt*. In deciding *Prevatt*, the Second District affirmed a jury's finding that the plaintiff's gunshot wound was a foreseeable consequence of the sale of alcohol to minors, while the First District in *Bryant* was able to find as a matter of law that the plaintiff's stumble was the unforeseeable result of the sale of an entire case of rum to a minor. The only other relevant fact distinguishing *Prevatt* from *Bryant* was that the sale of alcohol in the latter was made to a minor friend of the plaintiff while he was not present. *See Bryant*, 352 So. 2d at 544; *Prevatt*, 201 So. 2d at 781. It does not seem wise social policy to make a vendor who sells a case of hard alcohol to a minor liable for the injuries to or caused by the buyer, while at the same time shielding that vendor with immunity from liability for any injuries to or caused by the buyer's minor friends who share the alcohol. Nonetheless, in 1981 the Fifth District read *Bryant* to stand for the proposition that liability extends only to the

the Fourth District Court's decision in *United Services Automobile Ass'n v. Butler*, the first case in the state to address whether a *private* social host was liable for injuries caused by providing alcohol to a minor.⁷⁸ The Fourth District found that there was no statutory cause of action against a private social host for providing alcohol to a minor; nor did the common-law impose such a duty of reasonable care.⁷⁹ The court reasoned that despite the broad language of the pertinent statute making it "unlawful for any person to sell, give, serve, or permit to be served alcoholic beverages to a person under 21 years of age,"⁸⁰ the intent of the legislature was that the law only apply to commercial vendors.⁸¹ The court cited portions of the statute that specifically referenced licensees to support its interpretation.⁸²

Four years after rejecting the concept of social-host liability in Florida, the Fourth District again limited the scope of liability for those who provided intoxicating beverages to people under twenty-one years of age.⁸³ In *Migliore v. Crown Liquors of Broward, Inc.*, the court held that dramshops that sold alcohol to minors were not liable to injured third parties, directly conflicting with the Second District's ruling in *Prevatt*.⁸⁴ Using questionable logic that was subsequently rejected by the Florida Supreme Court,⁸⁵ the court opined that by passing a law in 1980 that expressly provided a third-party statutory cause of action against "a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age,"⁸⁶ the state legislature determined that no prior third-party cause of action existed under Florida law,⁸⁷ even though one had been recognized by Florida courts for fifteen years.⁸⁸ Thus, the Fourth District contended that while section 768.125 provided a cause of action for third parties injured after May 24, 1980, those hurt by intoxicated minors before the

buyer and the victims of the buyer. See *Burson v. Gate Petroleum Co.*, 401 So. 2d 922, 924 (Fla. 5th Dist. Ct. App. 1981).

78. 359 So. 2d 498 (Fla. 4th Dist. Ct. App. 1978).

79. See *id.* at 500.

80. FLA. STAT. § 562.11(1)(a) (2006).

81. See *Butler*, 359 So. 2d at 500.

82. See *id.* The statute made it unlawful for anyone to permit a minor to consume alcoholic beverages "on the licensed premises" and prohibited minors from misrepresenting their age to a licensee. § 562.11(1)(a), (2)(b).

83. *Migliore v. Crown Liquors of Broward, Inc.*, 425 So. 2d 20 (Fla. 4th Dist. Ct. App. 1982).

84. *Id.* at 22.

85. See *Migliore v. Crown Liquors of Broward, Inc.*, 448 So. 2d 978, 981 (Fla. 1984).

86. FLA. STAT. § 768.125 (2007). The *Migliore* court was adjudicating a personal-injury lawsuit arising from a car accident that occurred in 1978, two years before the statute was ratified. The statute went into effect on May 24, 1980. See *Migliore*, 448 So. 2d at 978.

87. See *Migliore*, 425 So. 2d at 23.

88. See *Prevatt*, 201 So. 2d at 781.

effective date could not seek a remedy from the vendor of alcohol. In overruling the appellate court, the Florida Supreme Court reaffirmed the *Prevatt* reasoning that section 562.11 was enacted to protect intoxicated minors from themselves as well as to protect the rest of society from the intoxicated minors.⁸⁹

B. *The Development and Interpretation of Statutory Liability*

Given the enactment of section 768.125 four years prior, the court's holding with respect to pre-1980 vendor liability was of little import or precedential value. However, *Migliore* remains significant over twenty years later for its interpretation of the legislature's first attempt to codify a civil cause of action against those who put alcohol into the hands of minors. The statute reads:

A person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person.⁹⁰

Although there is little in the legislative history or plain language of the statute that supports this conclusion,⁹¹ the court determined that the legislative intent behind section 768.125 was to *limit* the judiciary's expansion of liability against vendors for the sale of alcohol to minors. The court hung its hat on the dubious premise that because the legislature did not expressly codify *Davis* and *Prevatt*, it therefore intended to restrict their application. The court also placed substantial import on the enacting title of the statute, while effectively disregarding the pertinent provision that abrogated the immunity for those who sold alcohol to minors or to habitual drunkards.⁹²

89. See *Migliore*, 448 So. 2d at 979-80.

90. § 768.125.

91. The very brief legislative history indicates the opposite intent in its summary of the scope of the law:

Provides that a person who sells or furnishes alcoholic beverages to another person shall not thereby be liable for injury or damage caused by the intoxication of such other person. Provides an exception for the sale or furnishing of alcoholic beverages to a person under 18 years of age, or to a habitual drunkard under certain conditions specified by current law.

H.B. 1561, 1980 Leg., Reg. Sess. (Fla. 1980). Until October 1, 1980, Florida's minimum-legal-drinking age was eighteen. See Jones, Pieper & Robertson, *supra* note 26, at 113.

92. See *Migliore*, 448 So. 2d at 981 (quoting FLA. STAT. § 768.125 (1980)).

Given the express terms of section 768.125, the interpretation of the statute as a *limitation* on such causes of action is curious. In fact, the habitual-drunkard exception was not previously recognized under Florida statutory or common law.⁹³ Thus, *Migliore* interpreted a statute that *established* a previously unrecognized cause of action against a dispenser of alcohol to be a *limitation* on the right of injured plaintiffs.

The text of the statute should be read to codify the case law governing vendor liability as it was under *Davis* and *Prevatt*, not limit it. The language stating that a provider may be liable for injuries “caused by or resulting from the intoxication of such minor”⁹⁴ indicates a clear intent to recognize causes of action on behalf of the intoxicated minor as well as any harmed third party. Moreover, these words reaffirm the *Prevatt* court’s holding that “the proximate cause of the injury is the sale rather than the consumption” of alcohol.⁹⁵ Yet, despite the plain language of the text, Florida courts have not interpreted the statute to relax the causation standard promoted in several districts.⁹⁶

Migliore’s interpretation of section 768.125 as a limitation on *Davis* and its progeny is of paramount significance to the evolution of social-host liability in Florida. Three years after *Migliore*, for the first time in its history, the Florida Supreme Court granted certiorari to address the issue of social-host liability in the state.⁹⁷ Specifically, the *Bankston* court undertook to decide whether section 768.125 created a cause of action against a private social host who provided alcohol to a minor.⁹⁸ Relying on *Migliore*, the court answered the question in the negative, finding that the legislature did not intend to impose such a duty on social hosts.⁹⁹

In deciding the case under section 768.125, the majority opinion does not quote the relevant portion of the statute that would give rise to the plaintiff–appellant’s cause of action.¹⁰⁰ The majority conceded that “petitioner’s argument that the plain language of the statute creates a

93. See *Dowell v. Gracewood Fruit Co.*, 559 So. 2d 217, 217–18 (Fla. 1990) (finding that a habitual-drunkard clause does not provide a cause of action against a private social host).

94. FLA. STAT. § 768.125 (2007).

95. *Prevatt v. McClennan*, 201 So. 2d 780, 781 (Fla. 2d Dist. Ct. App. 1967).

96. The *Prevatt* proximate-cause analysis was largely ignored by the First and Fifth Districts in cases such as *Bryant* and *Burson*, in which the courts declined to recognize a cause of action on behalf of those injured by an intoxicated minor who was provided with alcohol by, but was not privy to, a vendor’s illegal sale of large quantities of alcohol. See *Bryant v. Jax Liquors*, 352 So. 2d 542, 544 (Fla. 1st Dist. Ct. App. 1977); *Burson v. Gate Petroleum Co.*, 401 So. 2d 922, 924 (Fla. 5th Dist. Ct. App. 1981).

97. *Bankston v. Brennan*, 507 So. 2d 1385 (Fla. 1987).

98. *Id.* at 1385.

99. *Id.* at 1385–87.

100. See *id.* at 1385–88.

cause of action against a social host has superficial appeal,"¹⁰¹ but chose to stand by *Migliore's* dubious interpretation of the statute:

As we explicitly recognized in *Migliore*, vendor liability had been *broadened* by judicial decisions and that the legislative response to that trend was to *limit* that liability. It would therefore be anomalous and illogical to assume that a statute enacted to limit preexisting vendor liability would simultaneously create an entirely new and distinct cause of action against a social host, a cause of action previously unrecognized by the common law, and which has heretofore been unrecognized by statute or judicial decree.¹⁰²

Thus, despite the plain language of the statute recognizing a cause of action against any person who furnishes a minor with alcohol, the court interpreted the legislative intent behind section 768.125 as preserving the immunity afforded to social hosts under pre-existing statutory law and common law. In a persuasive dissenting opinion, Justice Adkins attacked the foundation of the majority's decision.¹⁰³ Adkins compared the new law with the language in section 562.11 and noted that section 562.11 explicitly referenced licensees, while section 768.125 drew no express distinctions between commercial vendors and private social hosts.¹⁰⁴ The dissenting opinion further noted that the only restriction added by section 768.125 to prospective plaintiffs was a willfulness requirement, an express standard not previously imposed under section 562.11.¹⁰⁵ In this regard, the dissent agreed with the *Migliore* proposition that section 768.125 limited the scope of liability for those who provided minors with alcohol. The incongruence in the eyes of Justice Adkins was created by interpreting the willfulness limitation to establish *absolute* immunity for Florida's social hosts, when the plain language of the statute clearly indicated otherwise.¹⁰⁶

C. *The Advent of Social-Host Liability in Florida*

After decisions such as *Migliore* and *Bankston* marginalized potential causes of action against negligent social hosts, the Florida legislature again set out to expand the scope of liability for those who provided alcohol to minors. With the passage of what became known as the "Open House Party" statute,¹⁰⁷ the legislature criminalized the provision

101. *Id.* at 1387.

102. *Id.* at 1386–87 (citation omitted).

103. *Id.* at 1388–90 (Adkins, J., dissenting).

104. *See id.* at 1388.

105. *See id.* at 1389.

106. *See id.* at 1388–89.

107. FLA. STAT. § 856.015 (2007). Seemingly not learning its lesson, the Florida legislature enacted the open-house-party law without any guidance whatsoever for the judiciary. The

of alcohol by a private social host just one year after the state supreme court declared that Florida law prohibited such liability.

Relying on this statute, the First District Court of Appeal recognized a cause of action in negligence per se against a private social host for the first time in Florida history.¹⁰⁸ In *Newsome*, the court adjudicated a wrongful-death claim brought on behalf of Rachele Aguiar, a minor who died from a self-inflicted gunshot wound after being served by the defendant social host.¹⁰⁹ The court reasoned that the new law was intended to protect minors from the dangers of drugs and alcohol, effectively imposing a duty of care on social hosts, the breach of which would subject them to a civil cause of action.¹¹⁰

Also of note was that the court dismissed the appellee-defendant's contention that the gunshot wound was too improbable a result of the service of alcohol to the decedent to allow a finding of legal causation. The court found that there were not enough facts to find as a matter of law that the violation of the statute was not a proximate cause of the injury.¹¹¹ One year later, the Second District declared its approval of the First District's interpretation of the open-house-party statute and recognized a cause of action in negligence per se on behalf of a third party injured by an intoxicated minor who was provided with alcohol by a private social host.¹¹²

Thus, over thirty-five years after Florida courts first recognized a cause of action against vendors who illegally provided alcohol to minors, the state's judiciary finally abrogated the immunity previously enjoyed by social hosts who performed the same act.

IV. SURVEY OF SOCIAL-HOST POLICIES EMPLOYED BY THE FIFTY STATES

States use three different approaches with respect to social-host lia-

operative Senate bill did not even reference the intent of the law. See S.B. 824, 1988 Leg., Reg. Sess. (Fla. 1988).

108. *Newsome v. Haffner*, 710 So. 2d 184, 185 (Fla. 1st Dist. Ct. App. 1998). This decision came down ten years after the legislature's passage of the open-house-party statute. Fla. S.B. 824.

109. *Newsome*, 710 So. 2d at 186.

110. See *id.* at 185-86.

111. *Id.* at 186. This was the same court that made a finding two decades prior to deciding *Newsome* that a minor plaintiff's accidental fall while intoxicated that led to his paralysis was too improbable an injury stemming from the illegal sale of alcohol to minors to constitute proximate cause as a matter of law. See *Bryant v. Jax Liquors*, 352 So. 2d 542, 544 (Fla. 1st Dist. Ct. App. 1977). A year after *Newsome*, the Florida legislature enacted FLA. STAT. § 768.36 (2007), prospectively prohibiting plaintiffs from recovering damages if they are found to be under the influence of alcohol and as a result are more than 50% responsible for their injury. It is unclear what effect this will have on causes of action brought by minors, who are presumed incapable of handling alcohol.

112. See *Trainor v. Estate of Hansen*, 740 So. 2d 1201, 1202 (Fla. 2d Dist. Ct. App. 1999).

bility. The first approach is to recognize a cause of action at common law on behalf of a plaintiff whose injury is causally related to the furnishing of alcohol to a minor.¹¹³ The second method is to bar at common law any recovery by a similarly situated plaintiff, but to simultaneously recognize a cause of action with statutory derivations.¹¹⁴ The third practice is to immunize private social hosts and bar any potential recovery for a plaintiff injured as a result of a house party gone wild.¹¹⁵

A. *Social-Host Liability Under the Common Law*

While jurisdictions such as Florida require a statutory basis for any cause of action against a social host, several states that impose liability against hosts who furnish alcohol to minors do so under common-law principles of negligence. Prior to 1984 however, the two leading cases basing social-host liability on common-law negligence principles were subsequently overturned by wary state legislatures.¹¹⁶ In *Wiener*, the Oregon Supreme Court recognized that the legislature had not provided a cause of action against a social host with the state's alcoholic beverage control act, but nonetheless found that such a cause of action existed against the host fraternity under Oregon common law.¹¹⁷ Similarly, the *Coulter* court found that the foreseeable risk of injury to highway drivers posed by the service of alcohol to an intoxicated would-be motorist warranted the imposition of a common-law duty of care.¹¹⁸ In each case though, the respective state legislature greatly restricted the judicial extension of liability.¹¹⁹

Over the next decade and a half, the public became more attuned to the problems posed by underage drinking and driving while intoxicated. In an often-cited 1994 case, the Arizona Supreme Court was required to determine whether a plaintiff who was rendered a quadriplegic by an underage drunken driver had a cause of action against the fraternity that

113. See, e.g., *Estate of Hernandez v. Arizona Bd. of Regents*, 866 P.2d 1330, 1334 (Ariz. 1994); *Daniels v. Carpenter*, 62 P.3d 555, 557 (Wyo. 2003).

114. See, e.g., *Congini v. Portersville Valve Co.*, 470 A.2d 515, 517 (Pa. 1983). This is also the approach used by Florida courts. See discussion *supra* Part III.

115. See, e.g., *Charles v. Seigfried*, 651 N.E.2d 154, 155 (Ill. 1995).

116. See *Weinert*, *supra* note 22, at 877-78. The two cases were *Coulter v. Superior Court of San Mateo County*, 577 P.2d 669 (Cal. 1978), and *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 485 P.2d 18 (Or. 1971).

117. *Wiener*, 485 P.2d at 21-23.

118. *Coulter*, 577 P.2d at 673-74.

119. See CAL. BUS. & PROF. CODE § 25602(c) (West 1997) (expressly abrogating the *Coulter* decision); OR. REV. STAT. § 30.955 (1979) (repealed 1987); see also *Weinert*, *supra* note 22, at 877-78.

served alcohol to the driver.¹²⁰ The decade prior to the *Estate of Hernandez* decision had witnessed a struggle between the Arizona judiciary and its legislature to develop a suitable policy governing dramshop and social-host liability.¹²¹ The trial court had awarded the fraternity with summary judgment, and the intermediate appellate court affirmed, holding that the state legislature had immunized social hosts from liability for serving underage drinkers.¹²² Despite the plain language of the statute, which declared that “a person, firm, corporation or licensee is not

120. *Estate of Hernandez v. Arizona Bd. of Regents*, 866 P.2d 1330, 1333 (Ariz. 1994). The original plaintiff, Ruben Hernandez, was also left blind and severely brain damaged as a result of the 1988 accident. He succumbed to his injuries after two years, passing away in July of 1990. *See id.*

121. The court summarized the relevant case law and legislative background of social-host and vendor liability:

At one time, Arizona arguably did not recognize civil liability for those who furnished or sold alcohol that was a contributing factor in a later accident. In 1983, however, we held that a licensed tavern owner could be liable to third persons injured by an intoxicated patron. We also held that the tavern owner could be liable to a minor who was furnished alcohol and, as a result, injured himself.

Following these decisions, in April 1985, the Arizona Legislature enacted A.R.S. § 4-301, dealing with “social hosts” and granting civil immunity to non-licensees who serve alcohol to a person *over* the legal drinking age. One obvious purpose of § 4-301 was to limit the extension of [the court’s prior rulings] to non-licensees. The statute reads:

Liability limitation; social host:

A person other than a licensee . . . *is not liable* in damages to any person who is injured, or to the survivors of any person killed, or for damage to property, which is alleged to have been caused in whole or in part *by reason of the furnishing or serving of spirituous liquor to a person of the legal drinking age.*

Id. at 1334 (citations omitted).

A year after passing ARIZ. REV. STAT. ANN. § 4-301 (2002), the legislature complemented the law with two additional laws governing civil liability for social hosts and vendors. First, the legislature expressly imposed liability for injuries and property damage against a vendor who sold alcohol to an underage or obviously intoxicated customer. ARIZ. REV. STAT. ANN. § 4-311A (2002). Next, the legislature enacted a statute entitled “Liability limitation,” which purported to immunize all vendors who were not subject to liability under section 4-311, as well as all social hosts. ARIZ. REV. STAT. ANN. § 4-312B (2002). It was this statutory provision that the trial and appellate courts relied on in granting summary judgment to the defendant social hosts. *See Estate of Hernandez*, 866 P.2d at 1333.

ARIZ. REV. STAT. ANN. § 4-312A (2002) also denied the purchaser of alcohol and the purchaser’s companions from suing the vendor for damages resulting from the illegal purchase; however, the Arizona Supreme Court overturned this provision because it unconstitutionally directed a finding of contributory negligence and assumption of risk, impermissibly infringing on the realm of the jury. *See Schwab v. Matley*, 739 P.2d 1088, 1092 (Ariz. 1990); *see also* ARIZ. CONST. art. XVIII, § 5.

122. *See Estate of Hernandez*, 866 P.2d at 1333. The fraternity, Delta Tau Delta, had a policy that any underage member could drink alcohol at social events provided that he contributed to a social fund controlled by a fraternity brother of legal drinking age. The chair of the social fund kept records of those who contributed in order to ensure that those who did not pay did not drink. The majority of fraternity members were under the legal drinking age of twenty-one. *See id.*

liable in damages to any person who is injured . . . in whole or in part by reason of the sale, furnishing or serving of spirituous liquor,”¹²³ the court found that the legislative intent behind the statute was not to repeal section 4-301. This section of the statute had passed just one year earlier and provided social hosts with immunity only for the act of supplying alcohol to guests of *legal* drinking age.¹²⁴ The court further reasoned that “[f]urnishing alcohol to underaged consumers creates an obvious and significant risk to the public. . . . We are hard pressed to find a setting where the risk of an alcohol-related injury is more likely than from underaged drinking at a university fraternity party the first week of the new college year.”¹²⁵

Accordingly, the court recognized the existence within the state of “a duty of care to avoid furnishing alcohol to underaged consumers.”¹²⁶

B. *Statutory Creation of Social-Host Liability*

Estate of Hernandez was decided during a twenty-five-year period when a number of state courts first recognized the existence of a similar duty at common law.¹²⁷ In an even larger number of jurisdictions, state legislatures established, and courts recognized, causes of action against social hosts who served alcohol to minors.¹²⁸

Of all the states that recognize social-host liability derived from a statutory basis, Michigan employs a statutory scheme most similar to Florida’s. In November 1985, less than eighteen months before the Florida Supreme Court decided *Bankston*,¹²⁹ the Michigan Supreme Court decided a case based on highly similar facts by holding that the state statute prohibiting the provision of alcohol to minors *did* create a

123. ARIZ. REV. STAT. ANN. § 4-312B (2002).

124. See *Estate of Hernandez*, 866 P.2d at 1335–38; see also ARIZ. REV. STAT. ANN. § 4-301 (2002).

125. *Estate of Hernandez*, 866 P.2d at 1341.

126. *Id.* at 1342. The court did preface its holding by noting that it was not establishing a “rule of absolute liability for serving alcohol to minors.”

127. See, e.g., *Ely v. Murphy*, 540 A.2d 54, 59 (Conn. 1988); *McGuiggan v. New England Tel. & Tel. Co.*, 496 N.E.2d 141, 162 (Mass. 1986); *Martin v. Marciano*, 871 A.2d 911, 913 (R.I. 2005); *Marcum v. Bowden*, 643 S.E.2d 85, 86 (S.C. 2007); *Biscan v. Brown*, No. M2001-02766-COA-R3-CV, 2003 Tenn. App. LEXIS 875, at *2 (Tenn. Ct. App. Dec. 15, 2003); *Daniels v. Carpenter*, 62 P.3d 555, 564 (Wyo. 2003).

128. See, e.g., *Newsome v. Haffner*, 710 So. 2d 184, 186 (Fla. 1st Dist. Ct. App. 1998); *Mowell v. Marks*, 627 S.E.2d 141, 144–45 (Ga. Ct. App. 2006); *Fullmer v. Tague*, 500 N.W.2d 432, 437 (Iowa 1993); *Longstreth v. Gensel*, 377 N.W.2d 804, 805 (Mich. 1985); *VanWagner v. Mattison*, 533 N.W.2d 75, 81 (Minn. Ct. App. 1995); *Walker v. Key*, 686 P.2d 973, 978 (N.M. Ct. App. 1984); *Rust v. Reyer*, 693 N.E.2d 1074, 1077 (N.Y. 1998); *Huston v. Konieczny*, 556 N.E.2d 505, 506 (Ohio 1990); *Congini v. Portersville Valve Co.*, 470 A.2d 515, 519 (Pa. 1983); *Knight v. Rower*, 742 A.2d 1237, 1245 (Vt. 1999).

129. *Bankston v. Brennan*, 507 So. 2d 1385 (Fla. 1987). The decision came down on May 21, 1987.

cause of action against a private social host.¹³⁰ Despite the fact that the two laws were highly similar,¹³¹ the two courts reached opposing views as to whether each respective penal statute also imposed civil liability for damages caused by those who violated it.

A decade later, the Michigan legislature enacted another statute governing adults who hosted parties with underage guests but did not necessarily provide the alcohol.¹³² This new law was similar to the "Open House Party" regulation Florida enacted in 1988.¹³³ Unlike the Florida law, which drew a challenge on the grounds that it was unconstitutionally vague,¹³⁴ the Michigan law clearly defined behavior that would violate the statute:

Evidence of all of the following gives rise to a rebuttable presumption that the defendant allowed the consumption or possession of an alcoholic beverage or a controlled substance on or within a premises, residence, or other real property, in violation of this section:

130. See *Longstreth*, 377 N.W.2d 804. Like *Bankston*, the defendant in *Longstreth* held a party in which an underage drinker became intoxicated and caused an accident while driving home. Unlike *Bankston* however, the plaintiffs in *Longstreth* were the parents of the intoxicated minor who died in the car accident, as opposed to the innocent third-party plaintiff in *Bankston*. See *Bankston*, 507 So. 2d at 1386.

131. Compare MICH. COMP. LAWS § 436.33 (1985) (repealed 1998) (current version at MICH. COMP. LAWS § 436.1701(1) (2001)) ("[A] person who knowingly sells or furnishes alcoholic liquor to a minor, or who fails to make diligent inquiry as to whether the person is a minor, is guilty of a misdemeanor"), with FLA. STAT. § 562.11 (1980) ("It is unlawful for any person to sell, give, serve, or permit to be served alcoholic beverages to persons under 21 years of age.").

132. See MICH. COMP. LAWS § 750.141a (2001).

133. See *id.* § 750.141a(2), (2)(a) ("[A]n owner, tenant, or other person having control over any premises, residence, or other real property shall not . . . [k]nowingly allow a minor to consume or possess an alcoholic beverage at a social gathering on or within that premises, residence, or other real property."). "Allow" is defined as "giv[ing] permission for, or approval of, possession or consumption of an alcoholic beverage . . . [b]y a form of conduct, including a failure to take corrective action, that would cause a reasonable person to believe that permission or approval had been given." *Id.* § 750.141a(1)(b), (b)(iii). Those in violation of the statute are guilty of a misdemeanor. *Id.* § 750.141a(4), (5).

Similarly, according to the Florida "Open House Party" law:

No person having control of any residence shall allow an open house party to take place at said residence if any alcoholic beverage or drug is possessed or consumed at said residence by any minor where the person knows that an alcoholic beverage or drug is in the possession of or being consumed by a minor at said residence and where the person fails to take reasonable steps to prevent the possession or consumption of the alcoholic beverage or drug.

FLA. STAT. § 856.015(2) (2007).

134. See *State v. Manfredonia*, 649 So. 2d 1388, 1389 (Fla. 1995). Although the trial and intermediate appellate courts found the constitutional challenge persuasive, the Florida Supreme Court overturned the lower courts' decisions, finding that, although the open-house-party law "[was] not a paradigm of legislative drafting," it was not unconstitutionally vague. *Id.* at 1390. The challenge was based on the fact that the legislature had not defined what "reasonable steps" a social host should be required to take in preventing underage consumption of alcohol. See *id.*

- (a) The defendant had control over the premises, residence, or other real property.
- (b) The defendant knew that a minor was consuming or in possession of an alcoholic beverage or knew that an individual was consuming or in possession of a controlled substance at a social gathering on or within that premises, residence, or other real property.
- (c) The defendant failed to take corrective action.¹³⁵

In a 2005 Michigan case, a plaintiff who lost his left eye in a fight at the defendant's 2001 New Year's Eve party attempted to bring a civil cause of action against the social host under the statute.¹³⁶ The fight occurred between the plaintiff, Simon Mesleh, and the codefendant Jason Samp, a guest at the party.¹³⁷ While the accounts of how and why the fight started differed, witnesses said that the fight broke out in the front yard and that the party's underage host, Stephen Young, was not present.¹³⁸ The appellate court found that Young violated section

135. MICH. COMP. LAWS § 750.141a(6)(a)–(c) (2001). The legislature further defined “[c]orrective action” as:

(i) Making a prompt demand that the minor or other individual depart from the premises, residence, or other real property, or refrain from the unlawful possession or consumption of the alcoholic beverage or controlled substance on or within that premises, residence, or other real property, and taking additional action described in subparagraph (ii) or (iii) if the minor or other individual does not comply with the request.

(ii) Making a prompt report of the unlawful possession or consumption of alcoholic liquor or a controlled substance to a law enforcement agency having jurisdiction over the violation.

(iii) Making a prompt report of the unlawful possession or consumption of alcoholic liquor or a controlled substance to another person having a greater degree of authority or control over the conduct of persons on or within the premises, residence, or other real property.

Id. § a(1)(e)(i)–(iii).

136. *Mesleh v. Young*, No. 262514, 2005 Mich. App. LEXIS 2253 (Mich. Ct. App. Sept. 20, 2005).

137. *Id.* at *1. The trial court found no evidence that Young furnished the alcohol to his guests, although the police cited him for possession of alcohol by a minor, and Mesleh testified in his deposition that he served himself beer that he found on the kitchen counter. *See id.* at *3, *13. Based on this evidence, the appellate court held that “the trial court correctly found that there was no genuine issue of material fact as to whether [Young] violated [the Michigan statute penalizing the provision of alcohol to minors].” *Id.* at *4, *14.

138. *See id.* at *1–*2. Stephen Young's mother, Sharon Young, was also named as a codefendant. *Id.* at *1. The party began when she left her son home alone on December 31, 2000, at 10:00 p.m. *See id.* Stephen had thrown parties in the past, causing neighbors to complain to Sharon. *See id.* at *8. Further, Stephen was on a tether that evening due to a pending narcotics charge and was not allowed to leave the premises. *See id.* at *2, *3 n.2. While it is not a stretch to conclude that the wild house party that ensued after Sharon left her delinquent son home alone on New Year's Eve was highly foreseeable, the court found that this conduct alone was not violative of section 750.141a: “[T]he trial court correctly stated that the issue is not whether underage consumption was foreseeable, but whether Sharon knowingly allowed the underage consumption.” *Id.* at *8. This aspect of the *Young* holding makes it very difficult for plaintiffs in

750.140a by hosting a party at which underage drinking took place, which would constitute negligence per se if the plaintiff could show that this violation was the proximate cause of his injuries.¹³⁹ Unfortunately for Mesleh, the court disagreed with his proximate cause analysis, finding that there was no genuine issue of material fact as to whether the twenty-one-year-old Samp's violent attack was a foreseeable result of the underage consumption occurring at the party.¹⁴⁰

C. The "BYOB" Party and Control of the Alcohol Supply

Although the *Young* court upheld the summary judgment for the defendants, the case is illustrative of the import that the open-house-party laws have in shaping social-host policy. States without such laws generally follow the rule that social hosts can only be found liable for the acts of their inebriated underage guests when they actually supply and serve the alcohol.¹⁴¹ That social hosts should be in control of the

Michigan to bring an action under the house-party law where the parents were not home when the party took place, because Mesleh had a very strong argument that Sharon Young had "allowed" the party to occur as the term is defined by section 750.141a(1)(b)(iii) of the Michigan Compiled Codes. *See id.* at *6-*7. Fortunately for such plaintiffs, the court declined to publish *Mesleh*, rendering dubious its precedential value. *Id.*

139. *See id.* at *11-*12.

140. *See id.* at *12. That Samp was of legal drinking age at the time of the party was crucial to the court's analysis. *See id.* The court also found dispositive the fact that Mesleh had been at the party for just thirty minutes, that there was no evidence of brewing tension between him and his attacker, and that it was implausible that the small amount of alcohol he consumed at the party played any role in the fight. *See id.*

141. *See, e.g.,* *Martin v. Watts*, 513 So. 2d 958, 960, 963 (Ala. 1987) (holding that a cabin owner was not liable for injuries caused by intoxicated underage guests to whom he did not serve alcohol); *Marinaccio v. Zaczynski*, No. CV 960565991, 1998 Conn. Super. LEXIS 1367, at *18-*19 (Conn. Super. Ct. May 14, 1998) (upholding summary judgment for father who was not present and did not provide alcohol to injured plaintiff guest); *Manuel v. Koonce*, 425 S.E.2d 921, 922-24 (Ga. Ct. App. 1992) (holding that parents who had left their son home alone and had not provided him with alcohol were not liable for injuries caused by his guests to whom he had served alcohol); *Ulwick v. DeChristopher*, 582 N.E.2d 954, 957 (Mass. 1991) (holding that a social host owed no common-law duty of care to stop an underage guest from drinking and driving at a bring-your-own-booze-style party); *Langemann v. Davis*, 495 N.E.2d 847, 848 (Mass. 1986) (holding that a mother who knew or reasonably should have known that her daughter was serving alcohol at a party in her home was not liable for injuries caused by an intoxicated guest where the mother did not furnish the alcohol and only provided a premises at which the teens could drink); *Rust v. Reyer*, 693 N.E.2d 1074, 1075-76 (N.Y. 1998) (finding that a minor social host who arranged for a group of guests to bring kegs to her party and expected to receive a share of the proceeds from cup sales had "furnished" alcohol to minors under the operative state law); *Alumni Ass'n v. Sullivan*, 572 A.2d 1209, 1212-13 (Pa. 1990) (refusing to extend the existing standard of care to impute liability to a social host who "knew or should have known" that alcohol was being served to minors and finding that no liability existed for a defendant who did not serve, supply, or purchase the alcohol that was served to underage drinkers); *Kovar v. Krampitz*, 941 S.W.2d 249, 251, 255 (Tex. App. 1996) (finding property owner not liable to decedent underage guest of his grandson who received alcohol from another guest and died while driving intoxicated); *Knight v. Rower*, 742 A.2d 1237, 1245 (Vt. 1999) (declining to impose liability on an adult social host who

alcohol supply in order to be found liable for injuries caused by or inflicted upon their intoxicated guests is a crucial element of the rationale in *Kelly v. Gwinnell*,¹⁴² perhaps the most famous social-host liability case ever decided. In *Kelly*, the New Jersey Supreme Court extended to private hosts the same duty placed on licensed vendors of alcohol to alleviate the foreseeability of drunk-driving accidents by cutting off inebriated patrons or guests.¹⁴³ The court defended this position, explaining that

The argument is made that the rule imposing liability on licensees is justified because licensees, unlike social hosts, derive a profit from serving liquor. We reject this analysis of the liability's foundation and emphasize that the liability proceeds from the duty of care that accompanies control of the liquor supply. Whatever the motive behind making alcohol available to those who will subsequently drive, the provider has a duty to the public not to create foreseeable, unreasonable risks by this activity.¹⁴⁴

The *Kelly* decision's detractors fret over the implications that the opinion imposes on interactions between party hosts and their adult guests.¹⁴⁵ These concerns, however, do not apply to the social dynamic

did not supply the alcohol); *Dickinson v. Edwards*, 716 P.2d 814, 820 (Wash. 1986) ("The relevant inquiry [in determining vendor liability negligence] is who had the authority to deny further service of alcohol when intoxication became apparent."). But see *Daniels v. Carpenter*, 62 P.3d 555, 564 (Wyo. 2003) (finding that a parent or homeowner who "knew or should have known" that alcohol was being consumed by a minor guest could be found liable in tort). The *Daniels* court announced two additional elements that, if met, could trigger liability for a social host under the common law:

Second, there is no liability unless the parents/homeowners knew or should have known that the minor guest was drinking to the point of intoxication. And third, there is no liability unless the parents/homeowners knew or should have known that the minor guest would soon be driving an automobile.

Id.

142. 476 A.2d 1219, 1224 (N.J. 1984). With *Kelly*, the New Jersey Supreme Court imposed, on social hosts, liability to the victims injured by their drunk adult guests. See *id.* at 1230.

143. *Id.* at 1224.

144. *Id.*

145. In a humorous critique of the *Kelly* rationale, Justice Neil Lynch of the Supreme Judicial Court in Massachusetts opined:

I doubt that there are many among those that entertain in their homes who would, in a family setting, have the temerity to suggest that a parent or perhaps a mother-in-law should immediately cease the consumption of spirituous drink because, in the host's opinion, that family member was at risk of becoming intoxicated. Even greater folly might be required for a host to attempt to "shut off" a guest, as a bartender might, when that guest was not only a family member, but a former Marine Corps drill instructor, "Green Beret," or linebacker for the New England Patriots.

Ulwick, 582 N.E.2d at 958 (Lynch, J., concurring).

The *Kelly* court noted that imposing this novel duty on private-party hosts potentially could awkwardly infringe on accepted social norms, but determined that the benefits justified the costs:

between an adult social host who cuts off the alcohol supply to an underage guest. To the contrary, a parent at home in a supervisory role is in far better position to mitigate the dangers associated with underage drinking than the youthful inebriate, which warrants the imposition of a duty of care against adults who serve alcohol to underage guests.¹⁴⁶ But to limit this duty to only those hosts who actually purchase and serve alcohol renders impotent a crucial weapon in the movement to contain the hazards inherent to the alcohol-centric youth culture.¹⁴⁷ By expanding this duty to impose a standard of reasonable care on those who condone teen drinking in their homes, the more comprehensive social-host policy could place substantial pressure on these adults to either supervise their underage guests or take proactive measures to stop underage consumption of alcohol.

V. CONCLUSION

The social costs of underage drinking fall on all members of society. While the national movement to establish twenty-one years of age as the minimum-drinking age throughout the country had a positive effect, a culture of teen drinking persists.¹⁴⁸

One effective measure of alleviating the substantial costs inherent to underage drinking is the imposition of civil liability against adult social hosts who serve alcohol to underage guests.¹⁴⁹ Most states, however, extend this liability only to those hosts who actually serve those

We impose this duty on the host to the third party because we believe that the policy considerations served by its imposition far outweigh those asserted in opposition. While we recognize the concern that our ruling will interfere with accepted standards of social behavior; will intrude on and somewhat diminish the enjoyment, relaxation, and camaraderie that accompany social gatherings at which alcohol is served; and that such gatherings and social relationships are not simply tangential benefits of a civilized society but are regarded by many as important, we believe that the added assurance of just compensation to the victims of drunken driving as well as the added deterrent effect of the rule on such driving outweigh the importance of those other values. Indeed, we believe that given society's extreme concern about drunken driving, any change in social behavior resulting from the rule will be regarded ultimately as neutral at the very least, and not as a change for the worse; but that in any event if there be a loss, it is well worth the gain.

Kelly, 476 A.2d at 1224.

146. See, e.g., *Ely v. Murphy*, 540 A.2d 54, 55 (Conn. 1988). The *Ely* court found that the defendant parents, who threw a keg party in celebration of their son's high school graduation, could be found to have breached their duty of care to a guest who was killed by another intoxicated guest's drunken driving. *Id.* at 55–56, 59.

147. See discussion *supra* Part II.B.

148. See discussion *supra* Part II.

149. See, e.g., Sabrina A. Hall, Perspective, *Clouded Judgment: The Implications of Smith v. Merritt in the Realm of Social Host Liability and Underage Drinking in Texas*, 30 ST. MARY'S L.J. 207, 212–13 (1998); Hincken *supra* note 44.

under twenty-one and immunize adults who merely condone underage drinking in their homes, but do not have control over the supply of alcohol.¹⁵⁰ Florida, along with a small minority of states, has decided to extend liability to social hosts that allow house parties where minors drink alcohol, whether the host's or an independent supply.¹⁵¹ However, the state's legislature and judiciary have not gone far enough to establish a policy that penalizes negligent parents and homeowners, or to reward hosts who take proactive measures to ensure the protection and safety of minors who do drink.¹⁵²

To the contrary, the existing statutory scheme from which Florida's social-host policy is derived¹⁵³ immunizes those parents who can maintain plausible deniability as to the consumption of alcohol by their underage guests,¹⁵⁴ while subjecting to both civil¹⁵⁵ and criminal¹⁵⁶ liability those parents who attempt to supervise this inherently dangerous¹⁵⁷ behavior. For Florida law to more effectively prevent and contain the negative effects of underage drinking, state courts should recognize and impose a common-law duty on all parents and homeowners to exercise reasonable care when there is a foreseeable risk that underage drinking might occur in their homes. Further, courts should interpret the open-house-party law to account for the reasonable measures taken by hosts to protect their underage guests, such as the prevention of drunken driving and other preemptive, precautionary measures.¹⁵⁸

150. See *supra* note 143 and accompanying text.

151. See discussion *supra* Parts III.C, IV.C.

152. See discussion *supra* Part I.

153. See FLA. STAT. § 856.015 (2007); *Newsome v. Haffner*, 710 So. 2d 184, 185 (Fla. 1st Dist. Ct. App. 1998).

154. See discussion *supra* Part I.

155. See, e.g., *Trainor v. Estate of Hansen*, 740 So. 2d 1201, 1202 (Fla. 2d Dist. Ct. App. 1999).

156. See, e.g., *State v. Manfredonia*, 649 So. 2d 1388, 1389 (Fla. 1995); see also *Jump*, *supra* note 1.

157. See discussion *supra* Part II.B.

158. The 2003 Tennessee case of *Biscan v. Brown*, incorporated each of these features. No. M2001-02766-COA-R3-CV 2003, Tenn. App. LEXIS 875 (Tenn. Ct. App. Dec. 15, 2003), *aff'd*, 160 S.W.3d 462 (Tenn. 2005). In upholding a jury verdict of just under \$4 million, the court determined that an adult social host was not entitled to judgment as a matter of law, despite the fact that he did not furnish alcohol to any of his daughter's party guests. See *id.* at *1-*2. The adult host, Paul Worley, allowed his daughter's guests to bring alcohol to her eighteenth birthday celebration, contingent only on the understanding that none of the children be allowed to drive. *Id.* at *3-*4. Instead of enforcing this rule himself, however, he passed this responsibility on to his daughter and did not make any effort to take any car keys from her guests. *Id.* at *43-*45. Towards the end of the evening, Jennifer Biscan decided to leave the party with her friend Hughes Brown, who was heavily intoxicated. See *id.* at *4, *75. A mile from the house, Brown ran into a guardrail, and Biscan suffered serious injuries in the crash, including brain damage that left her functioning at the emotional level of a nine-year-old. *Id.* at *4, *119-*120. Applying principles of comparative fault, the jury found Hughes 70% liable for driving intoxicated, Worley 15% liable

By adopting a requisite duty of care for social hosts under the common law, Florida would afford those victims injured as a result of underage drinking with a far more flexible cause of action than currently provided by the rigid requirements of the existing statutory scheme. Under the open-house-party law, a plaintiff proximately injured as a result of underage drinking must be able to establish five elements provided by the statute to have a valid cause of action:

1. a party took place at which alcohol was served;¹⁵⁹
2. the defendant was in "control" of the residence at which the party took place;¹⁶⁰
3. guests under the legal drinking age consumed alcohol at the party;¹⁶¹
4. the defendant had knowledge of this underage consumption of alcohol;¹⁶² and
5. the defendant failed to take reasonable measures to prevent the underage consumption.¹⁶³

While future appellate courts could potentially apply more flexible standards in defining the elements of control and knowledge, it does not appear as if the statute currently provides a cause of action against a

for his negligence as host, and Biscan 15% liable for accepting a ride from a visibly impaired friend. *Id.* at *1. In affirming the imposition of a duty of care against Worley, the court noted that:

[T]he burden placed on Mr. Worley to prevent harm caused by an intoxicated minor driver leaving Mr. Worley's home was not onerous. He himself devised a plan which merely required him to enforce the rule he attempted to impose. He only had to retrieve car keys or make the cars inaccessible. Of course, he also could have banned alcohol or refused to have the party.

Id. at *58. The court continued:

Consequently, the evidence before the court at the summary judgment stage was sufficient for it to conclude that Mr. Worley voluntarily assumed a duty to ensure that minors who had been drinking did not leave the party by driving.

Because the law imposed a duty upon Mr. Worley and/or because he voluntarily assumed a duty, the trial court properly denied his motion for summary judgment. It was left to the jury to decide if he breached the duty of reasonable care.

Id. at *64.

159. FLA. STAT. § 856.015(2) (2007).

160. Control is defined as "the authority or ability to regulate, direct, or dominate." *Id.* § 856.015(1)(b).

161. *Id.* § 856.015(2).

162. *Id.* The statute does not expressly define the term "knows," which gives rise to speculation whether courts would require proof of actual knowledge or accept a "knew or should have known" standard. See generally Steenson, *supra* note 22, at 88–97 (discussing the various applications of the knowingness requirement throughout the country).

163. § 856.015(2). The failure of the legislature to define what courts should consider to be "reasonable steps" drew a constitutional challenge for vagueness in *State v. Manfredonia*, 649 So. 2d 1388, 1389–90 (Fla. 1995).

parent who was not physically present during the party, and the extent of the scienter requirement remains dubious.¹⁶⁴ Unfortunately, this likely interpretation of the statute encourages parents to establish plausible deniability with respect to their guests' drinking and immunizes those who leave their children home alone without making any effort to ensure that drinking does not occur.

For instance, the Michigan court in *Mesleh v. Young*¹⁶⁵ applied a statutory scheme quite similar to the one in place in Florida¹⁶⁶ to determine whether a plaintiff could bring a cause of action against a homeowner after losing his eye in a fight during a party hosted by her teenage son, Stephen. Stephen had a fairly significant history as a party animal, about which his mother, Sharon Young, was well aware. Her neighbors had complained to her in the past about his alcohol themed parties, and on the night in question—New Year's Eve 2001—Stephen was under house arrest for pending narcotics charges.¹⁶⁷ Nonetheless, Sharon granted Stephen an unsupervised home with which to ring in the new year. Although Sharon's approach to parenting all but ensured that an alcohol-themed party would take place at her house, the court found that her lack of knowledge about actual drinking precluded the plaintiff's claim against her.¹⁶⁸

It hardly seems wise to immunize parents like Sharon Young who effectively sponsor raucous underage binge drinking through their absence, while holding proactive chaperones such as Jeff Bolduc negligent per se. A more relaxed common-law standard in which juries could evaluate the totality of the parents' precautionary efforts to determine their reasonableness would eliminate this flaw in the law.¹⁶⁹

Along these same lines, the existing system in Florida recognizes

164. Florida courts would likely apply the traditional "knew or should have known" standard. See, e.g., *Kitchen v. K-Mart Corp.*, 697 So. 2d 1200, 1205 (Fla. 1997) (applying the "knew or should have known" standard with respect to negligent entrustment of a firearm to a minor). However, a number of courts have seemingly ignored this traditional standard in favor of more stringent showings of knowledge. See, e.g., *Alumni Ass'n v. Sullivan*, 572 A.2d 1209, 1212 (Pa. 1990) ("The 'knowingly furnished' standard requires actual knowledge on the part of the social host as opposed to imputed knowledge imposed as a result of the relationship."). Like Florida, Pennsylvania imposes a duty on social hosts that derives from a criminal statute. See *Congini v. Portersville Valve Co.*, 470 A.2d 515, 517 (Pa. 1983).

165. No. 262514, 2005 Mich. App. LEXIS (Mich. Ct. App. Sept. 20, 2005).

166. See *supra* notes 133–39 and accompanying text.

167. *Mesleh*, 2005 Mich. App. LEXIS 2253 at *1, *6, *8.

168. *Id.* at *9.

169. Such a duty of affirmative action would be consistent with general principles of negligence addressed by the *Restatement (Second) of Torts*. See, e.g., *RESTATEMENT (SECOND) OF TORTS* § 324A (1965):

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his

only the preventive steps taken by the host to ensure that underage drinking does not occur without crediting efforts taken by a host who condones the drinking, but who makes a valiant effort to prevent drunken driving by young guests. By rendering negligent per se a parent who recruits friends to help supervise youthful bacchanalia or simply condones drinking in the home, the law discourage parents like these from taking such precautionary measures. Under the existing statutory scheme, evidence of the efforts Jeff Bolduc made to ensure that every guest at his daughter's party would not drive home and instead had a place to sleep within a few blocks of his home¹⁷⁰ would be irrelevant as there would be no genuine issue of material fact as to his culpability in any of the five elements of the open-house-party law.

A parent in Jeff Bolduc's position faces several options, and the purpose of Florida's social host policy should be to encourage such parents to take the most socially desirable action available. While some argue that turning the guests away and banning alcohol is the only acceptable course,¹⁷¹ this approach presupposes that these teenagers will not go drink elsewhere, and, as most empirical evidence dictates, this is rarely the case.¹⁷² When factoring in the inevitability of underage drinking, a civil-liability scheme that mandates a zero-tolerance policy from parents is entirely counterproductive. Employing a more flexible approach to social-host policy, in which the totality of the parental host's actions is taken into account, could lead to more effective adult involvement in and supervision of underage drinking.

Thus, to the extent that the imposition of civil liability is able to influence public behavior, these changes to Florida law would help place responsible adults in a position where they can only have an ameliorative effect on the frequency of teenage binge drinking and the collateral damages that inevitably ensues.

failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm

Id. Thus, an adult host who welcomes in teenagers as guests or "undertakings" should recognize the foreseeable risk of underage drinking and exercise reasonable care to protect society from the danger of drunken driving.

170. See Jump, *supra* note 1.

171. See *id.*

172. See discussion *supra* Part II.B.